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81-2259

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

WILLIAM M. BOUBEL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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June, 1982

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QUESTIONS PRESENTED

1. Whether a railroad company, by accepting a railcar containing toxic chemicals into its yard, becomes an absolute insurer of the safety of its employees under the Federal Employers' Liability Act in the event of injury to an employee in such yard from gas, with no evidence of negligence on the part of the railroad.

2. Whether the decision of the Court of Appeals for the Fifth Circuit serves to establish a duty of care from employer to employee which does not comport with that certain duty established by the United States Supreme Court in the case of *Shenker* v. *Baltimore and Ohio Railroad Co.*, 374 U.S. 1 (1963), among other cases.

3. Whether, in view of the fact that a lump sum general award of damages was made by the jury, it was not error for the trial court to include in its charge elements of damages unsupported by evidence.

4. Whether a jury may speculate on the proximate cause of a plaintiff's alleged injuries in the absence of reasonably persuasive proof that the defendant alleged negligence was the probable cause of such injuries.

5. Whether an award of damages of $55,000.00 to a plaintiff for approximately 2½ minutes of exposure to noxious fumes in an open area, with medical evidence by the plaintiff's doctor of complete recovery by the plaintiff within five weeks of such exposure and with no probative evidence of any serious or continuing injury resulting therefrom, is excessive and unreasonable.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATIONS

Petitioner is a wholly-owned subsidiary of the Missouri Pacific Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

The Petitioner, MISSOURI PACIFIC RAILROAD COMPANY, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court for the Fifth Circuit entered on February 16, 1982, and requests that summary reversal of said judgment be ordered.

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals for the Fifth Circuit affirming the Judgment of the District Court for the Southern District of Texas in favor of WILLIAM M. BOUBEL appear in Appendix A and Appendix D, respectively, to this Petition. The Order of the Court of Appeals denying a Petition for Rehearing appears in Appendix E. The Memorandum and Order of the United States District Court for the Southern District of Texas appears in Appendix B. The Final Judgment of said District Court appears in Appendix C.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on February 16, 1982 (Appendix A). A Petition for Rehearing, timely filed, was denied on March 15, 1982 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves § 51 of the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq., which is reprinted in Appendix F hereto.

STATEMENT

1. Plaintiff, WILLIAM M. BOUBEL, brought this suit under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, et seq., seeking damages for allegedly serious and permanent injury to his body generally occurring on August 14, 1978, while performing the duties of his employment for the Defendant, MISSOURI PACIFIC RAILROAD COMPANY. Mr. Boubel averred that the occurrence of August 14, 1978, out of which the suit arose, was caused in whole or in part by the negligence of the employees and representatives of the Defendant in failing to provide him with a reasonably safe place in which to do his work.

The United States District Court for the Southern District of Texas submitted this case to the jury on a special charge. The jury found that the defendant, MISSOURI PACIFIC RAILROAD COMPANY, was negligent on the occasion in question when Mr. Boubel was allegedly injured and that such negligence was a cause in whole or in part of the injury allegedly suffered by Mr. Boubel. Thereupon, the Court instructed the jury to consider the following elements of damages in assessing the amount to be awarded to Mr. Boubel: (a) physical pain and mental anguish in the past; (b) physical pain and mental anguish, which, in reasonable probability, Mr. Boubel would suffer in the future; (c) loss of earnings in the past; and (d) loss of earning capacity which, in reasonable probability, Mr. Boubel would suffer in the future. Applying this standard, the jury determined that the amount of $55,000.00 would fairly and adequately compensate WILLIAM M. BOUBEL for injuries he allegedly sustained as a result of the negligence of the Defendant. The verdict of the jury appears in Appendix G hereto.

Thereafter, Defendant filed a Motion for New Trial and Plea for Remittitur in the Alternative to Motion for Judgment Notwithstanding Verdict (Appendix H) which was denied by the District Court by Memorandum and Order dated February 18, 1981 (Appendix B).

On February 16, 1982, the Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court that Plaintiff recover from the Defendant the sum of $55,000.00 (Appendix D). In reaching its decision, the Court, in pertinent part, stated the following by its opinion (Appendix A):

> "The record contains sufficient evidence, from which reasonable inferences may be drawn, that the railroad was negligent in allowing noxious fumes in the work area or in working the employees in proximity to such fumes."

The Court additionally opined as follows:

> "Further, appellant's complaint that the verdict is excessive must also be rejected. We cannot determine from the general award of damages that any improper or unsupported elements were considered."

2. On August 14, 1978, Plaintiff, WILLIAM M. BOUBEL, was in the employ of the Defendant, MISSOURI PACIFIC RAILROAD COMPANY. On such date, he was working in the yard of the MISSOURI PACIFIC RAILROAD COMPANY in Laredo, Texas, when he allegedly inhaled "real bad fumes" at approximately 10:30 A.M. when coupling an air hose between a caboose and tank car. He stated that a metal cap was hanging loose from the tank car and clear liquid was dripping to the ground from such car. However, the trainmaster at the yard, Mr. Amador Hinojosa, testified that he could not locate exactly where the smell was coming from. Mr. Boubel stated that he started to suffer from headaches, stomach cramps and dizziness. Mr. Boubel also stated that his throat and lungs were irritated by the fumes. However, Mr. Boubel finished his full work day and didn't ask to be taken to a doctor.

Upon arriving home, Mr. Boubel stated that he went to bed with dizziness, headaches, disorientation and nausea. Thereafter, subsequent to inquiries by his wife to the railroad and a doctor, Mr. Boubel was taken to the Mercy Hospital in Laredo, Texas. Mr. Boubel stayed in the hospital for four days and then returned home. Mr. Boubel stated that he had continuing medical problems which resulted in his seeking a consultation with other doctors, including Dr. Daniel Jenkins in Houston, Texas, who was selected by Mr. Boubel's attorneys.

Mr. Boubel stated he lost approximately $10,000.00 in railroad wages due to his inability to work between the time of the accident in August, 1978, and January 1979, when he returned to work with the railroad. Further, Mr. Boubel testified that he lost income from his inability to continue in a lawnmower repair business after the incident in question. Mr. Boubel testified that such business produced approximately $10,000.00 to $12,000.00 of income per year. Also, he testified that he was unable to work overtime for the railroad. However, Mr. Boubel himself did admit that his condition improved in September, October and November, 1978, after the incident in question, and he said that he was getting stronger as time progressed.

Dr. Jenkins put Mr. Boubel through extensive testing during a hospitalization in Houston, Texas, between September 17-21, 1978. All of Dr. Jenkins' tests showed Mr. Boubel to be in good health and fully recovered. Dr. Jenkins testified that Mr. Boubel did not have any residual problems which would result from exposure to any toxic fumes in the future. Dr. Jenkins further stated that Mr. Boubel was able to return to work when he was released from the hospital on September 21, 1978, five weeks after the incident in question.

Fellow employees of Mr. Boubel testified that upon his return to work in January, 1978, he satisfactorily performed the same work for the railroad as he was engaged in at the time of the incident in question. After his return to work, Mr. Boubel's wages increased substantially.

The specific tank car which Mr. Boubel claimed was leaking and which he implied was the source of fumes he inhaled was examined by car inspectors at the border crossing between Mexico and Texas. Mr. Amador Hinojosa, the trainmaster at the Laredo, Texas, yard, testified that not only do Missouri Pacific inspectors check the trains crossing the border, but also other inspectors make an examination at such point. Further, the Missouri Pacific has additional inspectors checking the cars when they arrive in the Laredo yard from the border. Mr. Boubel, through his own testimony, confirmed that the border inspection was regularly conducted and, further, testified that he personally observed that the inspection process had been conducted in the Missouri Pacific's yard at the time the fumes in question allegedly were inhaled.

REASONS FOR GRANTING THE WRIT AND FOR SUMMARY REVERSAL

I.

NEGLIGENCE ISSUE

In view of the record of proceedings in the District Court below showing absolutely no negligence on the part of the Defendant in causing injury to the Plaintiff, the effect of the ruling of the Court of Appeals for the Fifth Circuit is that a railroad company will be held *strictly liable* for any injuries to its employees when gas allegedly capable of producing injury is present in such company's yard, upon the assumption that the gas emanated from a railcar in the yard. It is respectfully submitted that this holding does not comport with the evidentiary requirements of the Federal Employers' Liability Act under which the Plaintiff's cause of action was brought. Further, such holding establishes an absolute duty of care for employers contrary to that certain standard of reasonable care mandated by the Act and court decisions thereunder. Moreover, the decision in question provides criteria which will adversely affect the flow of interstate commerce in a very material manner in that railcars containing noxious

gases or any contents which could conceivably be harmful to any employee if escaping may not be accepted into a yard without the assumption of absolute liability under the FELA by an employer railroad company. It is submitted that this result is not contemplated by the Federal Employers' Liability Act. In fact, the Court of Appeals for the Fifth Circuit very recently stated as follows on this issue: "The FELA is not a worker's compensation system. Employer negligence still remains a prerequisite to liability." *Soto* v. *Southern Pacific Transportation Co.*, 644 F.2d 1147, 1148 (5th Cir. 1981).

The United States Supreme Court case of *Shenker* v. *Baltimore & Ohio Railroad Co.*, 374 U.S. 1 (1963) dealt with injuries sustained by a railroad employee while loading mail into another railroad's car. The injuries were allegedly caused by a defective door. In the District Court, the jury returned a verdict for the plaintiff against the employer railroad, upon which the District Court entered judgment. On appeal, the Court of Appeals for the Third Circuit reversed, holding that the plaintiff failed to establish negligence on the part of his employer. On certiorari, the United States Supreme Court reversed, holding that the employer railroad had the duty to provide the employee with a safe place to work and to inspect foreign cars before permitting him to work with them. The United States Supreme Court specifically ruled as follows in regard to the duty owed to an employee by the employer in safe-place-to-work cases, thereby providing the measure for good industry practice:

> "We hold that the B&O had *a duty to inspect* P&LE cars before permitting its employees to work with them . . . . A railroad is bound to inspect foreign cars just as it would inspect its own cars. It owes the *duty of inspection* as master." (Emphasis added) (pg. 8).

In the case now before this Court, the record shows that inspection of the railcar in question took place not

only at its point of entry between the United States and the Mexican border, but also within the confines of the Laredo yard. There is absolutely no evidence in the record that such inspections were not conducted or that same were improperly conducted.

Attestation of the fact that the aforesaid inspections were conducted was made by the Plaintiff, WILLIAM M. BOUBEL, himself, as shown by the following testimony developed upon interrogation by his own counsel:

> Mr. Odam: Now, is it your understanding that the cars such as this, is it your understanding, first of all, that the car came across from Mexico?
>
> Mr. Boubel: From Mexico. Yeah. That is correct.
>
> Mr. Odam: And you agree with Mr. Hinojosa that—You heard his testimony that the Missouri Pacific inspects the cars to see if they're safe along with Tex-Mex?
>
> Mr. Boubel: They have to be inspected, that's correct.
>
> Mr. Odam: And you agree with him, it's your understanding that they're again supposed to be inspected there in the yard to see if they're safe to work with?
>
> Mr. Boubel: When we put them on the train again. Yes. That's what Mr. Cavazos was doing when we asked him to take the ground air off.

Mr. Cavazos was identified in the record as a car inspector.

Mr. Hinojosa, the trainmaster, testified as follows in regard to inspection procedures in answering questions posed by counsel for the Plaintiff:

> Mr. Odam: It's the responsibility of the railroad, I am talking about the Missouri Pacific, to check these cars before they come into the yard to be sure that they are safe to work around, I suppose. Isn't that right?
>
> Mr. Hinojosa: Well, they come out of Mexico. They check them right there at the bridge. Everybody checks them.

Mr. Odam: Missouri Pacific people check them. Is that right?

Mr. Hinojosa: Well, the joint inspectors there, car inspectors.

Mr. Odam: Joint car inspector—

Mr. Hinojosa: —at the railroad bridge.

Mr. Odam: Between Missouri Pacific—

Mr. Hinojosa: —Missouri Pacific and Tex-Mex Railroad.

Mr. Odam: And they check to see if it is safe—

Mr. Hinojosa: —Yes, sir.

Mr. Odam: —coming in at that point?

Mr. Hinojosa: Right, sir.

• • • •

Mr. Odam: So they're checked by the Missouri Pacific at this joint checking with Tex-Mex as they come across—

Mr. Hinojosa: —Right, sir.

Mr. Odam: —the bridge.

Mr. Hinojosa: (no answer)

Mr. Odam: And they check by—They're supposed to be checked by the Missouri Pacific people?

Mr. Hinojosa: Right.

Mr. Odam: Once they're in the yard?

Mr. Hinojosa: Right, sir.

The case of *Kuberski* v. *New York Central Railroad Company*, 359 F.2d 90 (2nd Cir. 1966), holds that although industry practice is not always the measure of proper diligence, it must be seen to be so in the absence of evidence that the general practice of an industry is not a reasonably prudent practice. No such evidence was introduced in the instant case in regard to the inspection procedures and, therefore, by the aforesaid rationale, the due diligence of the Defendant in providing for the safety of its employees was established. By affirming the District Court's judgment, the Court of Appeals for the Fifth Circuit has taken a position contravening the standards promulgated by this Court for gauging the railroad's conduct in the case of *Shenker* v. *Baltimore & Ohio Railroad Co.*, (supra), and by the Court of Ap-

peals for the Second Circuit in the case of *Kuberski* v. *New York Central Railroad Company*, (supra).

Further, by its decision in the case of *Nivens* v. *St. Louis Southwestern Railway Company*, 425 F.2d 114 (5th Cir. 1970), the United States Court of Appeals for the Fifth Circuit addressed the question of a plaintiff's burden in establishing liability of a defendant under Federal Employers' Liability Act cases. Although recognizing that an employee has a less demanding burden of proving causal relationship than that defined by the common-law proximate cause standard, the Court provided as follows:

> "However, the plaintiff still have the burden of proving a hazardous condition, *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959), and that the employer with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury; foreseeability is 'an essential ingredient' of negligence under the Act. *Gallick* v. *Baltimore & O. R.R.*, 372 U.S. 108, 117, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963)." (pg. 118).

In regard to the concept of foreseeability, it is submitted that this criteria is an extremely difficult one for the Plaintiff to meet in the instant case and, in fact, same was not met. That is to say, the foreseeability of a condition involving gas escaping from a railroad car was virtually eliminated after evidence was introduced to show that two inspections were conducted. Foreseeability as a concept *was* eliminated when the Plaintiff failed to introduce any evidence to abrogate the effectiveness and propriety of the multiple inspections conducted.

The case of *Pennsylvania Railroad Company* v. *Pomeroy*, 239 F.2d 435 (D.C. Cir. 1956) concerned an action brought against the railroad for the death of a passenger who fell through the open vestibule doors of a fast moving train on a graded curve. In reversing and remanding the case with directions to enter judgment for the de-

fendant railroad, the Court of Appeals held that where the alleged negligence of the railroad consisted of failure to inspect the doors in question more frequently, but the evidence was uncontroverted that an employee of the railroad had inspected the doors five to nine minutes before the train reached the place where the passenger fell, the railroad could not be found negligent in the absence of evidence from which the jury could infer that the inspecting employee of the railroad was not occupied with his other duties to such an extent during this short interval as to preclude more frequent inspection. The Court stated that "As the party having the burden of proof, the plaintiff had the obligation, as an element in showing negligence of this sort, to introduce sufficient evidence to permit the conclusion that there was opportunity for further inspections (citations omitted)." (pg. 440). The Court went on to comment that "The record simply is silent on this crucial point" and, accordingly, found that ". . . the jury was not given any evidentiary basis to infer or conclude that the (employee) had sufficient time and opportunity, in the short interval involved, to make a further inspection of vestibule doors." (pg. 440).

In applying the Federal Employers' Liability Act to the facts of such case, the Court of Appeals stated that ". . . if a railroad employee had disappeared from his train under circumstances similar to those of this case, with no further showing of specific negligence, and with no showing of unsafe working conditions or violation of law, there could be no liability, on the part of the railroad." (pg. 443). Moreover, the Court stressed as follows:

> "It is axiomatic that, to prevail in a negligence case, a plaintiff must prove sufficient facts, not only to warrant an inference of negligence, but also to justify an inference that such negligence was proximately related to the injury or death (citations omitted.)." (pg. 444).

It is submitted that the Court's basic reasoning is applicable to the instant case despite the fact that herein,

as has been stated, the causal relationship to be established is less burdensome than that required by the proximate cause standard. The Court then proceeded to state that

> ". . . vestibule doors can be freely opened by passengers as well as by railroad employees, and the fact that these doors were open was not *per se* negligence on the railroad's part. The only act of negligence involved here, assuming that there was negligence, was the failure to make further checks of the vestibule doors in the short interval . . . . To establish the causal relation between this assumed negligence and the death, it must be a reasonable inference from the proof—not a mere conjecture or supposition—that such negligence was responsible for the door being open at the time in question. In our view the evidence does not permit such a conclusion . . . . Only by an arbitrary guess, not based on or warranted by, any record evidence, could it be inferred that the vestibule doors were opened by a railroad employee or by a passenger under circumstances that would attribute the open doors to the railroad's failure to inspect the vestibule doors in the interval in question. In these circumstances, the jury could not reasonably infer the doors were open, and that Mrs. Pomeroy's death occurred, as a result of the railroad's assumed negligence—(citations omitted)." (pg. 445).

The Court concluded as follows:

> "To be sure, an open vestibule door on a moving train is a potentially dangerous thing, but the fact that it was open does not in and of itself presuppose negligence. As has already been shown, in the absence of proof, various equally plausible conjectures, other than the railroad's negligence, would account for the open doors. Since the doors may have been open for reasons other than a failure of duty on the railroad's part, it cannot be said that the accident would not in the ordinary course have occurred if the railroad had not been negligent." (pg. 446).

The facts of the case now before this Court may be compared to those described above. There is absolutely no evidence that the metal cap on the railcar in question was opened by a railroad employee. As the aforesaid vestibule doors may have been opened by a passenger, the loose metal cap referred to by the Plaintiff may have been removed by a non-railroad employee conducting some form of business at the Laredo, Texas, yard or removed by a trespasser or by some act of God. To determine the cause of the alleged removal is to engage in total speculation. Further, the record does not show absolutely that the tank car with the open cap was even the source of the fumes that Mr. Boubel allegedly inhaled in the yard. Other industries surrounding the yard may have been the source of the fumes testified about by Mr. Boubel. In any event, there was not any evidence introduced which would serve to attribute the alleged open metal cap or the fumes to the railroad's failure to inspect. As has been shown by the Plaintiff's own testimony, an inspection was conducted in the Laredo yard almost simultaneous to the time when the incident in question occurred. It is submitted that such inspection was considerably more timely than the inspection found to be proper as a matter of law by the Court of Appeals for the District of Columbia Circuit in the case of *Pennsylvania Railroad Company* v. *Pomeroy* (supra), which such inspection took place five to nine minutes prior to the accident involved therein.

During oral argument herein before the Court of Appeals for the Fifth Circuit, Justice Goldberg offered the opinion that perhaps the case was analogous to a *res ipsa loquitur* situation. Justice Politz contemplated whether the fumes in question may have come from an area outside of the railroad's yard. Both of these considerations are addressed by the recent Texas Supreme Court case of *Marathon Oil Company* v. *Sterner*, (No. C-564) (25 Tex. Sup. Ct. Jour. 274), wherein an opinion was delivered on April 21, 1982. In such case, the plain-

tiff brought suit against the defendant to recover damages for personal injuries allegedly resulting from exposure to some unidentified gas. The jury found substantially as follows:

> (1) the plaintiff sustained an injury on the defendant's premises;
>
> (2) the escape of gas or gases was due to the negligence of the defendant;
>
> (3) such negligence was a proximate cause of the plaintiff's injuries; and
>
> (4) $25,000.00 would fairly and reasonably compensate the plaintiff for his injuries.

The trial court rendered judgment for the plaintiff. The Court of Civil Appeals affirmed [624 S.W.2d 198 (Tex. Civ. App.—Galveston 1981)]. The Texas Supreme Court reversed the judgment of the Court of Civil Appeals and rendered judgment that the plaintiff take nothing.

The primary issue before the Texas Supreme Court was whether the case was properly submitted to the jury on a *res ipsa loquitur* theory. The defendant objected to the jury instructions on the basis that there was no evidence that the instrumentality which caused the accident was under the control of the defendant or that the defendant was guilty of any negligence. As in the case now before this Court, after the adverse jury verdict, the defendant filed a motion for judgment n.o.v. which was overruled by the trial court. The Texas Supreme Court stated that:

> "The doctrine (of *res ipsa loquitur*) is applicable only when two factors are present: (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant. (Citations omitted). Unless both factors are present, the jury cannot reasonably infer from the circumstances of the accident that the defendant was negligent (citation omitted)." (pgs. 275, 276).

The Texas Supreme Court, in holding that the plaintiff failed to produce any evidence that the accident was the type usually associated with negligence, cited with approval the following statement of the Court of Civil Appeals in the case of *Hogue* v. *El Paso Products Company*, 507 S.W.2d 246, 250 (Tex. Civ. App.-El. Paso 1974, writ ref'd, n.r.e.):

> "[T]he doctrine (*res ipsa loquitur*) does not apply under the meager proof in this case where none of the parties knew what caused the gassing. Escaping gas in the vicinity of a complex chemical plant could be due to unexpected and unforeseeable mechanical failure or it could be due to negligence."

The Texas Supreme Court then stated as follows:

> "The possibility of other causes for the accident besides the defendant's negligence does not have to be eliminated, but the likelihood of other causes must be so reduced that the jury can reasonably find that the negligence, if any, was committed by the defendant (citation omitted)." (pg. 276).

In the case now before this Court, the Plaintiff failed to show, without question, that he inhaled fumes caused by liquid leaking from a railcar in the Missouri Pacific yard. The trainmaster of the yard testified that the car specified by Mr. Boubel wasn't leaking upon his investigation and that he could not pinpoint where the smell in question was coming from. Upon interrogation by counsel for the Plaintiff, said trainmaster stated the following:

> Mr. Odam: But you knew that it (the smell) was coming from one of those cars?
>
> Mr. Hinojosa: It was coming from some place. I don't know where it was coming from. I don't know if it was a box car or some place else.
>
> Mr. Odam: And, again, you would agree that it was coming from one of those and that was not a safe place?
>
> Mr. Hinojosa: I won't say it was coming from one of those because I did not find anything now.

Accordingly, Plaintiff did not prove with certainty what instrumentality caused the fumes in question and, perforce, did not show that the Defendant controlled any such instrumentality. Moreover, as in the *Hogue* v. *El Paso Products Company* case (supra) cited with approval by the Texas Supreme Court, the place where the Plaintiff was allegedly gassed was an industrialized area wherein the escape of gas could be due to unexpected and unforeseeable mechanical failures, without any negligence on the part of the Defendant.

The case of *Shelton* v. *Thomson*, 157 F.2d 709 (7th Cir. 1946), concerned an appeal from a judgment rendered in an action brought under the Federal Employers' Liability Act to recover damages for injuries sustained by the plaintiff because of alleged carbon monoxide poisoning. The injuries complained of allegedly resulted when the plaintiff was poisoned by gas from a crane in the defendant's freight yard. As in the present case, one of the questions before the appellate court was whether there was any proof from which a jury might reasonably infer that the defendant failed to make suitable and proper inspection, which correctly represented the duty of care owed to the plaintiff. In the course of its decision, the Court pointed out that the defendant conceded in its brief that no regular inspection of the crane was made. Consequently, the Court stated as follows in its opinion:

> ". . . we think it a reasonable inference that if no regular inspection was made, no 'suitable and proper' inspection was made. In other words, if an inspection was made only occasionally, or irregularly, as defendant's concession would imply, it is not an unreasonable inference that defendant failed to make 'suitable and proper inspection,' as alleged." (pg. 710).

Conversely, in the case before this Court, it has been shown that it is undisputed that regular inspections were conducted. Therefore, by the exact logic and holding of the *Shelton* v. *Thomson* case, (supra), if such regular

inspections were made it would be a reasonable inference that the Defendant herein did make suitable and proper inspection. To complete the comparison between the case before this Court and the aforesaid case, the Plaintiff herein in his brief to the Court of Appeals for the Fifth Circuit conceded that "There is no material issue or contest as to the inspection question." (pg. 12).

It is submitted that in view of the fact that the Plaintiff failed to introduce any evidence from which the jury could reasonably infer that there was any negligence on the part of the railroad, a directed verdict or a judgment notwithstanding the verdict, both as moved for by Defendant should have been granted by the trial judge. This Court in the case of *Brady* v. *Southern Railway Company*, 320 U.S. 476, 479 (1943) stated that "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . . ." It is apparent that here there is a complete absence of probative facts to support the conclusion reached by the jury in regard to the alleged negligence of Defendant and, as such, reversible error exists. *Lavender* v. *Kurn*, 327 U.S. 645 (1946).

II.

DAMAGE ISSUE AND INSTRUCTIONS

The entirety of the evidence offered by the Plaintiff in the trial of this cause in no manner supports the submission of Question No. 3 to the jury in regard to future physical pain or mental anguish of the Plaintiff and future loss of earning capacity. (See Appendix G). Therefore, it is contended that the verdict, incorrectly arrived at by the jury, will not support the judgment entered for Plaintiff herein. Further, alternatively, the verdict of the jury as to general damages is grossly excessive and unreasonable under the evidence adduced at the trial and is punitive in character. Moreover, the jury was incorrectly instructed as to matters upon which damages were assessed.

A.

Lack of Evidence of Damages

1. Clearly militating against the award of any future damages is the testimony of Dr. Daniel Jenkins who was selected by Mr. Boubel's own attorney as his client's physician. Dr. Jenkins' testimony represents the only medical evidence offered other than a form approving Mr. Boubel's return to work and a letter report from Dr. Jenkins to the Plaintiff's attorney which was introduced into evidence by the Defendant.

In pertinent part, the aforesaid letter report from Dr. Jenkins states as follows:

> "In summary, I feel that Mr. Boubel was exposed to hydrogen sulfide fumes as part of his occupation on 8/14/78 and that he suffered an acute bronchitis, laryngitis and some systemic symptoms following the exposure. *There was no evidence of significant central nervous system damage. Since that time, however, there has been a clearing of the symptoms and as of the date of our examinations in September, there was no evidence of any residual or permanent effects from this exposure. I think he has made a complete recovery and have so informed him.*" (Emphasis added).

In addressing himself to the matter of exactly when he felt Mr. Boubel was able to return to work, Dr. Jenkins testified as follows in answering questions posed by counsel for the Defendant:

> Dr. Jenkins: At the completion of his hospitalization, we simply went over with him the results of his tests; pointed out to him that his examination at that point in time was within normal limits; that his breathing tests had come out quite satisfactorily; and also, his other laboratory examinations and examination of his larynx and his bronchial tree had been quite normal; and informed him that we did not feel that he had incurred any permanent or long-lasting injury; that what had in all probability

happened was that of an acute irritation at the time of the exposure.

He, of course, admitted to having less and less symptoms as time went on. And I told him that I thought he had made a complete recovery.

Mr. Davis: Now, Doctor, in view of that, did you form an opinion as to whether or not he was at that time capable of returning to his normal occupation, or work?

Dr. Jenkins: Yes. I felt that—

Mr. Davis: —and what was that opinion?

Dr. Jenkins: That he was able to return to work.

Mr. Davis: And that would have been when you released him from the hospital?

Dr. Jenkins: Yes. On September 21st, 1978.

The case of *Shelton* v. *Thomson*, 148 F.2d 1 (7th Cir. 1945) concerned an action brought under the Federal Employers' Liability Act for injuries allegedly sustained by an employee due to carbon monoxide poisoning. (See also *Shelton* v. *Thomson*, 157 F.2d 709 (7th Cir. 1946), cited above). The verdict was rendered for the employee and damages were assessed, including those for permanent injuries alleged. In the course of reaching a decision which served to reverse the trial court's judgment, with directions to grant a new trial, the Court of Appeals for the Seventh Circuit stated as follows in regard to the propriety of awarding future damages:

> "Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded; but to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff

> to recover present damage for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." (pg. 4).

In the case presently before this Court, not only is there an absolute absence of evidence to support the award of future damages or, at best, insufficient evidence, but there is overwhelming, affirmative evidence which stands directly in opposition to the award of such damages. Reference to the following testimony of Dr. Jenkins in regard to the exhaustive series of tests he conducted for Mr. Boubel is instructive in this regard:

> Dr. Jenkins: I admitted Mr. Boubel to the hospital where he remained for almost four days. And I carried out detailed inquiry and examinations of various types.
>
> Mr. Davis: Can you tell us what those four days were, the dates if you please?
>
> Dr. Jenkins: Yes. From September 17th through September the 21st of 1978.
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> • • •
>
> Dr. Jenkins: As part of the inquiry—after the completion of the history and physical examination, did a number of things. We obtained a number of laboratory studies. These were directed towards systems of the body which hydrogen sulfide would be expected to damage or injure.
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> • • •
>
> Dr. Jenkins: On examination, we found that his so-called vital signs were *normal*. That is, his blood pressure was *normal*, and 136/74.
>
> The pulse was 82 per minute and *regular*. The respiratory rate was 18 per minute. *And in general, he appeared to be a well-developed, well-nourished white male who was in no acute distress at the time he was first seen.*
>
> • • •
>
> Dr. Jenkins: Having gone through the history and physical examination, we then undertook certain

types of special procedures. The first of these was an X-ray examination of his chest. And this was entirely *within normal limits.*

He was subjected to an electroencephalogram. This is a brain wave tracing. And this, likewise, was *very normal.*

Certain laboratory tests were carried out, such as a complete blood count. And in this case, all elements of the blood, the red blood cells, the white blood cells, and the platelets, were *within normal limits.* . . . He had a complete chemical profile with some 15 chemical tests being done on his blood. And without enumerating these, they were all *well within normal limits.*

• • • •

Dr. Jenkins: . . . There are a number of different functions that the lung has. And we tested all of these, virtually all of these and to run through those:

The first of these is done by use of a measuring device known as a spirometer. And this simply measures the amount of air the individual can breath in and out and the rate at which he moves the air; in other words the air flow . . . And these were *all quite normal* in terms of comparison to someone his age, height, and sex.

• • • •

Dr. Jenkins: We put him in a rigid air-tight box known as a plethysmograph . . . And the resistance to the flow of air through his airways was *within normal limits.*

• • • •

. . . We then did some tests in which the nitrogen excretion is measured.

. . . He had *no abnormalities* on this test, showing that his small airways were *quite normal.*

. . . And he had *no abnormalities,* either in the large or medium size or in the small peripheral airways. And there was *no evidence* of obstruction or abnormality of air flow.

• • • •

Dr. Jenkins: The next is that of diffusion of, in this case, carbon monoxide from the air spaces of the lung into the blood.

. . . Now, his diffusing capacity pointed out that he had 98 percent of predicted value . . . So, there was *no significant damage* here.

Next we examined his arterial blood gases.

. . . In both cases, both instances, these gases were *normal.* . . .

We then had him exercise on a treadmill. And for five minutes, he walked at 2.5 miles per hour with a two degree incline to the treadmill. And at the end of that five minutes, he was *not short of breath.*

His blood gases show that his oxygen has risen from 82 to 99 millimeters of mercury. This is a *perfectly normal level* under stress. And his carbon dioxide level was 41 millimeters of mercury. Again, well *within normal limits.*

So, with the stress of exercise, he was *quite normal.*

• • • •

Dr. Jenkins: The final test was one of the testing of the mechanics of breathing.

. . . And the compliance of his lungs was *perfectly normal* under conditions of relaxed breathing, and under conditions of fast or rapid breathing. And so I think these mechanical properties were quite *within normal limits.*

• • • •

Dr. Jenkins: . . . And we—I took the occasion to examine his throat and his larynx, or his vocal chords and his bronchial tree with the aid of a fiberoptic bronchoscope that gives us a very close view of the mucous membrane.

• • • •

Dr. Jenkins: The condition we felt was *very normal.* We did not find any evidence at that point in time of inflammation or injury.

Mr. Davis: Were there any other tests that would be made, or that we should know about?

> Dr. Jenkins: *I think these are the significant ones.* (Emphasis added).

Further, it is also instructive in regard to the matter of reviewing future damages awarded to consider the data concerning stipulated earnings of Mr. Boubel which was admitted into evidence at trial without objection from Plaintiff. These earnings reveal the following facts:

> 1. In the seven full months that Mr. Boubel worked in 1978 prior to the date of the alleged accident, he earned an average salary of $1,737.43 monthly.
>
> 2. During the eleven full months that he worked in 1979 after the accident, Mr. Boubel earned an average salarly of $1,941.89 per month.
>
> 3. In the eleven full months recorded for 1980, Mr. Boubel earned an average salary of $2,059.25 per month.

Thus, it is clear that Mr. Boubel's earnings increased substantially after he returned to his regular job and, as such, the impropriety of including future loss of earning capacity among the elements of damages in Question No. 3 is shown. Also, although Mr. Boubel testified that he did not work as much overtime after the accident as before, Mr. Hinojosa, the trainmaster, testified that because additional crews had been added to the Laredo yard, there was no overtime work available for Mr. Boubel after his return to work. Further, Mr. Boubel testified that he stopped doing lawnmower repairs at home as a result of injuries claimed. However, as has been shown, evidence was introduced at the time of trial pointing out that Mr. Boubel was able to do his work in the Laredo yard and, in fact, he was doing such work at the time of trial. Therefore, perforce, it is submitted that Mr. Boubel would be capable of continuing his lawnmower repair operation. Absolutely no medical evidence was introduced which would indicate that Mr. Boubel was physically unable to accomplish this work. To the contrary,

the medical evidence that was introduced served to show that Mr. Boubel could accomplish such work only five weeks after his alleged injury.

2. The case of *Trejo* v. *Denver & Rio Grande Western Railroad Company*, 568 F.2d 181 (10th Cir. 1977), concerned an action brought under the Federal Employers' Liability Act wherein, over the defendant's objections, the Court instructed the jurors that if they found the plaintiff was entitled to a verdict, the amount of award should include the reasonable value, not exceeding the actual cost of plaintiff, of medical and hospital treatment incurred because of injuries or expenses reasonably certain to be incurred in the future. The record in this case contained no evidence of any such special damages, and plaintiff's counsel had conceded that he was not seeking recovery for any such expenses. In reaching its decision to reverse the trial court's decision and remand the case for new trial on issues pertaining to damages, the Court of Appeals for the Tenth Circuit stated as follows:

> "In spite of the evidentiary failure and explicit waiver, the court told the jury that in arriving at an award for the plaintiff it should include the actual cost to plaintiff for medical and hospital treatment. It is elementary that the evidence introduced must warrant the giving of an instruction. (Citation omitted) . . . .
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> "To support the instruction and the verdict, plaintiff argues that the court told the jury that its award must be based on the evidence presented; that there was no evidence of pre-trial medical expenses incurred by the plaintiff, and that it must be presumed that the award was not based on such medical expenses. We are not convinced. The jurors might well have concluded that medical expense is an inevitable cost of an injury and have drawn a reasonable inference that an award could include an estimate of such expense. The general verdict does not disclose whether they did so. In the circumstances, the instruction on special damages was wrong." (pg. 183).

Similarly, in the case now before this Court, the trial judge instructed the jury that it should consider damages based on future loss of earning capacity and future physical pain and mental anguish of the Plaintiff, all of which were not based on evidence adduced at the trial. As such, and by virtue of the fact that these unsupported elements of damage were placed in Question No. 3 with other elements by which the jury arrived at a lump sum general verdict, it is submitted that under the authority of the *Trejo* v. *Denver & Rio Grande Western Railroad Company* case (supra) said verdict should not be allowed to stand. By stating in its Opinion that it could not ". . . determine from the general award of damages that any improper or unsupported elements were considered," it is submitted that the Court of Appeals for the Fifth Circuit has clearly defined a situation which calls for remedy by this Court. (See Appendix A) (See also *Wilson* v. *Burlington Northern, Inc.*, 670 F.2d 780, 784 (8th Cir. 1982).

The Supreme Court of Texas in deciding the case of *Scott* v. *Atchison, Topeka & Santa Fe Railway Company*, 572 S.W.2d 273 (Tex. 1978) held as follows:

> "Whether the occurrence of acts or omissions are properly alleged in written pleadings and supported by evidence are questions of law. They have no place in the jury room.
>
> "Where multiple acts or omissions are alleged to be negligent, some of which are supported by evidence and some of which are not, or whether there is evidence of possible negligent acts or omissions which are not alleged to be negligent, the trial court should inquire only about those which are raised by both the pleadings and the evidence." (pg. 277).

Further, in response to a complaint that the Court of Civil Appeals erred in sustaining the defendant's objection to a broad form of submission of several specifically alleged acts of negligence of the parties, the Texas Supreme Court in the *Scott* v. *Atchison, Topeka & Santa Fe Railway Company* case (supra) held as follows:

"First, as heretofore indicated, all alleged specific acts of negligence were not supported by evidence. Secondly, there are facts in evidence in the present case from which negligence might have been inferred by the jury although not pleaded.

• • • •

"Special Issue No. 1 simply allowed the jurors to make their own determination as to whether on the occasion in question the railroad was negligent, without regard to whether acts or omissions upon which they reached a 10 to 2 answer had been raised by the pleadings and proof. This is contrary to the requirement in Rules 277 and 279 (Texas Rules of Civil Procedure) that special verdict submissions shall be only upon controlling issues that are raised by the written pleadings and the evidence. This requirement was unaffected by the 1973 amendment to Rule 277. The pleadings of the parties still furnish the blueprint for the charge. In the absence of trial by consent, a judgment not supported by the pleadings is erroneous. (Citation omitted).

"Under Rule 277, the trial court has the discretion to submit an issue broadly, including the combination in one issue of several acts or omissions which may be alleged to constitute negligence. However, when one or more pleaded acts or omissions are supported by evidence and the record contains evidence of other possible negligent acts or omissions which were not pleaded, *failure to limit the broad ultimate fact issue to acts or omissions which were raised by both pleadings and proof violates Rule 277 and is error.* In view of the wide variance between the pleadings and unpled facts and circumstances from which the jury could have inferred that the railroad was negligent, such error was reasonably calculated to and probably did cause the rendition of an improper judgment. Rule 434. Accordingly, the Court of Civil Appeals properly reversed and remanded the case for a new trial."

(Emphasis added) (pgs. 276, 277) (See Appendix I for text of rules, 277, 279 and 434).

The foregoing decision points out the error of the trial court in the case now before this Court in several respects. First, as has been shown, the evidence adduced did not support the submission of a damage issue, and the pleadings as well as the evidence introduced did not support the following instruction of the trial judge to the jury in regard to the matter of failure of the Defendant to exercise reasonable care in inspecting its cars coming into the Laredo yard, upon which the damage issue was predicated:

> "Now in this case specifically, the plaintiff claims that the defendant was negligent in not providing Mr. Boubel a reasonably safe place to work.
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> "And why? The plaintiff claims specifically two reasons. That the defendant allowed tank cars with escaping, dangerous, and potentially deadly toxic and noxious chemical fumes to enter the railroad yard for switching.
>
> "In other words, he says that the defendant was negligent in allowing the tank car with the leaking fumes to enter the railroad for switching.
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> * * * *
>
> "And secondly, that the defendant was negligent in allowing the dangerous and potentially deadly toxic and noxious chemical fumes to escape from one or more of the railroad cars of the yard in a closely confined space where Mr. Boubel had the responsibility of switching train cars and supervising others in such activity."

Further, the evidence adduced did not support submission of that part of Question No. 3 concerning future loss of earning capacity and future physical pain and mental anguish. Moreover, by including elements of damage which were not supported by evidence presented at the trial with other elements in Question No. 3 and requiring a general lump-sum determination by the jury, the trial court destroyed the efficacy of such issue submission. It is impossible to determine what weight the jury gave to the incorrect elements of damages in-

cluded in its deliberations. Also, the Defendant finds the foregoing excerpted instructions objectionable in that the trial judge refers to tank cars and railroad cars in the plural, thereby imparting to the jury the thought that an extremely dangerous situation existed which was not shown by the evidence. Further, the record is devoid of probative evidence that Mr. Boubel was working in a "closely confined space". It is submitted that the trial court's comments were improper and served to prejudice the jury in its thinking.

Substantive rights under the Federal Employers' Liability Act are not affected by the decision in the *Scott* v. *Atchison, Topeka & Santa Fe Railway Company* case (supra). This matter was addressed by the Texas Supreme Court on motion for rehearing of said case, as follows:

> "Our decision has put no end to Scott's alleged rights, and it does not defeat them. It merely requires the assertion and adjudication of those rights to be in accordance with the rules of procedure of the forum which he chose." (pg. 281).

B.

Excessiveness of Damages Awarded

It appears from the opinion of the Court of Appeals for the Fifth Circuit that rejection of the Defendant's claim concerning excessiveness of the verdict is based on the fact that the Court could not determine from the general award of damages that any improper or unsupported elements were considered. However, the Defendant's contentions in regard to excessiveness of damages extends much further than the point of error raised as to improper elements of damages from which the general verdict evolved. Specifically, as has been shown, the Plaintiff's own physician testified that the Plaintiff was healthy and well within five weeks of his alleged injury. The Plaintiff made no effective refutation of the opinions of his own doctor.

In the case of *Henry* v. *A/S Ocean*, 512 F.2d 401 (2d Cir. 1975), the Court held that the plaintiff's own testi-

mony was "no proof" to link the plaintiff's physical condition to the accident in question. The Court stated that ". . . a jury is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof that the negligence was the probable cause of the injury . . . ." (pg. 408). Moreover, in such case, expert medical testimony showed that the medical problems claimed by the plaintiff could not have been caused by the accident in question. Therefore, the comparison to the case before this Court is evident. Here, no persuasive proof of the injuries alleged to have been suffered by the Plaintiff was introduced to show that any actions of the Defendant were the cause of such alleged injuries and, similarly, expert medical testimony was introduced which pointed out that the Plaintiff herein was in good health and that the injuries alleged could not be based on any negligence of the Defendant.

The United States Supreme Court in the case of *Grunenthal* v. *Long Island Railroad Company*, 393 U.S. 156 (1968) held that a Court of Appeals should make a detailed appraisal of the evidence bearing on damages in considering whether there was an abuse of discretion in denying the defendant railroad's motion to set aside an award as excessive. The United States Supreme Court in such case stated that "If the Court of Appeals made a similar appraisal of the evidence . . . the details are not disclosed in the majority opinion." (pg. 159). Thereupon, the Supreme Court undertook its own appraisal of the evidence on damages. Similarly, such a detailed appraisal of the evidence is not disclosed by the opinion in this case now before this Court. It is submitted that in view of the District Court's refusal to order a remittitur herein, such an appraisal was necessary and proper in this case.

The case of *Dagnello* v. *Long Island Railroad Co.*, 289 F.2d 797 (2nd Cir. 1961), cited by the United States Supreme Court in the *Grunenthal* v. *Long Island Railroad Company* decision (supra) stated as follows con-

cerning appellate review on the question of excessiveness of damages:

> "We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." (pg. 806).

In view of the aforesaid language, the following summaries of cases are presented for consideration by this Court:

(1) *Henry* v. *A/S Ocean*, 512 F.2d 401 (2nd Cir. 1975).

Injury alleged: Plaintiff remained in cold, polluted water for approximately 20 minutes; he testified that following immersion he suffered colds and a skin rash over a three year period following accident.

Amount awarded: $10,000.

Appellate action: New trial ordered unless plaintiff consented to reduction of award by 50% to $5,000; Court found award of $10,000 "grossly excessive".

(2) *Rivera* v. *Rederi A/B Nordstjernan*, 456 F.2d 970 (1st Cir. 1972).

Injury alleged: Carbon monoxide poisoning; the plaintiff was unconscious for two hours after the accident, and for a period of one to two months thereafter suffered from intermittent headaches, for which he received medication; he was discharged from out-patient treatment and returned to work six weeks after the accident.

Amount awarded in lower court: $15,000 (reduced with consent from $21,500).

Appellate action: Determination that $15,000 award was "far in excess of reasonable compensation" for pecuniary losses and pain and suffering and remanded the case.

(3) *Bullard* v. *Central Vermont Ry.*, 565 F.2d 193 (1st Cir. 1977).

Injury alleged: Injury of right foot occurring as a result of having to jump off of train involved in head-on collision; mental condition resulting from experience.

Amount awarded in lower court: $35,000. (Defendant conceded loss of wages of $5,000).

Appellate action: Court held that jury was warranted in finding that the Plaintiff suffered foot injury that caused him pain, disability and lost earnings for several months but found award of $35,000 to be "plainly excessive", and, therefore, remanded the case to the lower court.

CONCLUSION

Accordingly, this Petition for Writ of Certiorari should be granted and the decision of the Court of Appeals for the Fifth Circuit in affirming the District Court's decision, should be reversed.

Respectfully submitted,

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